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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 18

WILLIAM BECK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 696.

WILLIAM BECK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW.

The Ohio Court of Appeals affirmed the judgment of the trial court without rendering a formal opinion. The Supreme Court of Ohio affirmed the judgment of the Court of Appeals.

The formal opinion announced by the Supreme Court, with two judges dissenting, was officially published in 175 Ohio State 73 (1963). Said opinion is incorporated in brief of petitioner, Appendix IV.

JURISDICTION.

Petitioner is invoking the jurisdiction of the Supreme Court of the United States under title 28 U.S.C.A., Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

1.

Were the clearinghouse slips obtained by illegal search and seizure, so as to render erroneous the refusal of the trial court to sustain the motion to suppress?

2.

Did the trial court err in refusing to order the police to disclose the identity of the informer?

STATEMENT OF THE CASE.

The police officers involved in the instant arrest had received confidential information that the Petitioner, William Beck was carrying on a clearinghouse operation, scheme of chance. They also knew that the same William Beck had a record of three previous arrests and convictions which were indicative of the fact that he was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. They also had a photograph of the accused.

The officers were members of the Bureau of Special Investigation Unit of the Cleveland Police Department. They knew where to look for the petitioner. They went to that locality at a time of day when "pickup men" are most active picking up slips. They knew, from their own personal knowledge of the past history of Beck together with the information they had received, that if they did find Beck operating a motor vehicle in such neighborhoods they would have reasonable ground to arrest him.

It was about one o'clock in the afternoon of November 10, 1961 when the Defendant was first seen operating a motor vehicle on Beulah Avenue north of East 115th Street. The Defendant was ordered to stop, the police

officers identified themselves, then searched the automobile but found nothing. The Defendant nevertheless was placed under arrest as being connected with the carrying on of a scheme of chance, conveyed to the 5th District where he was searched. An envelope with sheets of clearing house slips was found on his person. The Defendant subsequently was tried and found guilty as charged.

The Defendant was charged with violating Section 2915.111 of the Revised Code of Ohio. Before proceeding to hear the trial on the merits, the Court entertained a motion to suppress the evidence. The Defendant offered testimony to show that in his opinion the motion to suppress should be granted. The Court, however, overruled the motion, contending the arrest was lawful and the search was incidental to the arrest; that the arrest was made upon reasonable grounds that a felony had been committed.

In due course application for new trial was made and overruled. The case was reviewed by the Court of Appeals of Cuyahoga County which affirmed the judgment of the trial court. The following statement appeared in the Legal News of this city.

> "25890. M.C.—State of Ohio vs. Beck. Judgment affirmed. The record discloses bona fide arrest of deft. during commission of felony (Section 2915.-111, R. C.) reported to police officer by informant, Knowledge of police officer of previous convictions of deft. for like offense and locale and method of committing said crime and we conclude and hold therefrom that there was probable cause for the arrest, that search of person was reasonable and, therefore, lawful, and that the disclosure of the name of the informant to be neither relevant nor material in the cause, Ballard vs. State, 43 Ohio St. 340; In re

Quaries and Butler, in re McEntire and Goble, 158 U. S. 532, 535; State vs. Viola, 51 Abs. 577; Wigmore on Evidence, Vol. 8; para. 2374, page 751, 752, 756. Exceptions. O.S.J."

Thereupon the petitioner filed in the Supreme Court a motion to certify the record and appeal as of right. The motion was granted and the court heard the case on the merits. Judgment of the Court of Appeals was affirmed, *State vs. Beck*, 175 O. S., p. 73.

14 *O. Jur.* 2d 683. Courts.

Section 248 * * * Syllabus as confined to the facts; application to other cases.

"The syllabus states the law with reference to the facts upon which it is predicated, and will not be regarded as controlling in another case in which the controlling facts are totally different, even though the legal questions involved are identical. It has been held that the Supreme Court's syllabi do not bind the Supreme Court or other courts in another case not on 'all fours.'"

The syllabus of *State v. Beck*, 175 O. S. 73 is as follows:

"1. All searches and seizures without warrants are not prohibited by law. The search of an individual's person on the honest belief of an arresting officer, based upon probable cause that a felony has been committed, does not constitute an unlawful search, and incriminating articles seized during the search may properly be received in evidence against the individual at his trial for having in his possession such articles.

2. It is not reversible error on the part of a trial court to refuse to order the disclosure of the identity of an informer, whose information led in part to the apprehension and arrest of an accused person, where such disclosure would not be helpful and beneficial

to the accused in making a defense to a criminal charge lodged against him."

The law of the State where an arrest without a warrant take place determines its validity. *U. S. v. Di Re*, 332 U. S. 589.

LAW AND ARGUMENT.

Under the state of the record the court's refusal to sustain the motion to suppress was not error.

On the motion to suppress the evidence the trial court had before it a question of law which had to be determined upon the facts and circumstances of *this particular case*. The rule is well settled that in the first instance the reasonableness of search and seizure is to be determined by the trial judge from the facts and circumstances of the case and in the light of fundamental "criteria" laid down by the 4th Amendment and the decisions of the United States Supreme Court, *Ker vs. California*, 374 O. S. 23; *United States vs. Robenowitz*, 339 U. S. 56.

To support what is alleged in the motion, the petitioner called one and only one witness. He chose to rely solely on the facts developed by this witness to prove that the arrest was without probable cause.

None of the evidence offered by the petitioner was controverted by the State. Everything that the witness did testify to was indicative of the fact that there was probable cause for the arrest.

It is up to the trial judge to scrutinize and weigh in the light of the common experiences of man, evidence which tends to prove or disprove that the search and seizure was unreasonable.

"Determination of 'probable cause' for search without a warrant requires a dealing with probabilities, which are not technical, but are factual and practical con-

sideration of everyday life on which reasonable and prudent men, not legal technicians, act, and the standard of proof is accordingly correlative to what must be proved."

Brinegar v. U. S., 338 U. S. 160.

"There is no formula for determination of reasonableness. Each case is to be decided on its own facts and circumstances."

Go-Bort Co. v. United States, 283 U. S. 344-377.

The simple question that confronted the court was whether or not the facts and circumstances, which existed at the moment of arrest were evidence sufficient to constitute probable cause to arrest.

A very much respected opinion which deals with probable cause is found in *United States v. Rembert*, 284 Fed. 996. An excerpt from the opinion is as follows:

" 'The provision against unreasonable searches and seizures, being directed to prevent general exploratory writs and investigations of the homes of persons and the property of the citizen, has no application to and does not prevent the arrest in accordance with the course of common law, and of the statutes directing the same without a warrant, and wherever a felony has been committed, either in the presence of the officer or as to which the officer has a belief induced by reasonable grounds, or a misdemeanor has been committed in the presence of the officer, that is, of which the officer has evidence by his senses sufficient to induce a belief in him based upon reasonable grounds of belief, an arrest may be made without a warrant, and the instruments and evidence of crime seized.' "

The perpetrators of crimes against the state try to find refuge in the language contained in Section 2935.03 Revised Code, in that they attribute to the legislature an in-

tention to give to the word "found" a hostile meaning against law and order, in that the officer is restricted to his sense of sight alone. Too many cases have been decided otherwise. See *Houck v. State,* 106 O. S. 195; *Ballard v. State,* 43 O. S. 340.

If a court does decide from the facts and circumstances of a particular case that probable cause does not exist, the proof of that fact should be so obvious that the decision leaves no room for speculation. The chasm that exists between what is reasonable and what is unreasonable should be so wide that a court which would rule one way when it should have ruled the other would be guilty of a gross abuse of discretion.

On the other hand if the evidence relied upon to decide if probable cause existed is of such weight that the scales may tip either way, then in that case whatever the decision the trial court may make it should be decisive. Under such circumstances an appellate court should not be prone to substitute its judgment for the trial court.

In the case of *Husty vs. United States,* Vol. 282 U. S. page 694, on page 700 the court said in its opinion:

> "To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonable, discreet and prudent man to believe that liquor is iliegally possessed in the automobile to be searched."

Reasonableness of search and seizure is the ultimate constitutional test of the lawfulness of a search and seizure. It is the prerogative of the trial court to determine from the facts, circumstances and reasonable inferences that can be drawn therefrom whether or not a search is reasonable.

In this case the court could infer from the facts and circumstances that the police, being members of the Bureau of Special Investigation were specialists in the arrest and investigation of crimes having to do with the clearinghouse racket. The court could infer also that at the time the information was received, they understood that the petitioner was presently active in a particular neighborhood carrying on his assigned part in furthering the carrying on of a scheme of chance. The court could infer that the police knew the party who apprised them of this fact. The court could infer that this information together with what they already knew about the petitioner and observing him at a time of day in a particular neighborhood where they had no reasonable grounds to believe that he had any business there other than what they believe him to be doing, that is: carrying on a scheme of chance.

The court knew that at that moment the police could go no further—they had a choice, either arrest the petitioner or abandon the idea of apprehending a man that they had a bona fide belief was committing a felony in their presence. It was not a coincidence that the petitioner at the moment of arrest was carrying on a scheme of chance.

Columbus v. Riggle, 36 Ohio Law Abstract, 190 (decided September 9, 1941), headnote 1, Arrest (Abs. & O Jur.):

> "1. A person arrested while driving his car upon the city streets in the course of collecting slips containing records of wagers of those engaged in the 'numbers game' was engaged in the commission of an offense in the presence of an arresting officer so that no warrant was required, it being clearly established that the numbers game is a game of chance prohibited by ordinance."

In *Houck v. State*, 106 O. S., 195, the facts in this case were that an officer had information regarding a particular individual transporting liquor in his automobile. The officer came upon the automobile while it was parked, searched the vehicle and found the incriminating evidence —held to be a reasonable search. Syllabus 2 of this case is as follows:

> "A search of an automobile by an officer and a seizure by him of intoxicating liquors then being possessed and transported in violation of law, without a search warrant, is authorized though the officer has no previous knowledge of such violation, provided he acts in good faith and upon such information as induces the honest belief that the person in charge of the automobile is in the act of violating the law."

In the case of *U. S. v. Harris*, Vol. 331 U. S. page 145, the government officers had an arrest warrant for Harris. They questioned him in his apartment and incidental to the arrest searched the apartment. The officers found draft cards which were not related to the crime for which he was questioned. He nevertheless was charged with illegal possession of Government property and these draft cards were used as evidence against him. The court said on page 154 of its opinion as follows:

> "There during the course of a valid search the agents came upon property of the United States in the illegal custody of the petitioner. It was property of which the Government was entitled to possession. In keeping the draft cards in his custody petitioner was guilty of a *serious and continuing* offense against the laws of the United States. A crime was being committed in the very *presence* of the agents conducting the search. Nothing in the decisions of this Court gives support to the question that under such circumstances the law-enforcing officers must impotently stand aside and

refrain from seizing such contraband material." (Emphasis ours.)

A very pertinent statement applicable to the above subject is stated in the opinion of *State of Ohio v. Emerson Young*, No. 25915 in the Court of Appeals, Eighth Judicial District. We find on page 4 of the opinion the following:

> "Numbers tickets are easily secreted on or about the person, just as stolen jewels, narcotics or money can easily be placed on the person. If one may stand in the presence of an officer who is making a lawful search of premises, bearing on his person contraband articles such as those above named, and be secured from arrest and subsequent seizure of those articles, then enforcement becomes next to impossible, police officers are impotent, and the law-abiding people will become ruled by the lawless."

The United States Supreme Court held in *Draper v. United States*, 358 U. S. 307 "That information from a reliable informer corroborated by the agents observations as to the accuracy of the informer's description of accused, and of his presence at a particular place, were sufficient to establish probable cause for arrest without a warrant."

Summary.

The petitioner's hearing on the motion to suppress the evidence was fair and impartial and the determination arrived at by the trial judge was in accordance with the laws of Ohio, the constitution of this state, and the constitution of the United States; and concurs with the pronouncements of the United States Supreme Court in *Ker v. California*, 374 U. S. 23.

The trial judge was unique, he had been a police officer, a member of the Ohio State Legislature, a lawyer and a judge. In the Appellate Court two of the three mem-

bers had occupied the office of Chief Police Prosecutor then Municipal Court judge, next a tenure on the Common Pleas bench, finally a number of terms on the Appellate bench; the third member had been a Common Pleas judge then an Appellate Court judge up until the time of his demise. Finally in the Supreme Court five members of the court had no difficulty in affirming the trial court's judgment, and the writer of the majority opinion had been a member of the highest court of his state for thirty years! Certainly a decision, the fruit of such respectability, should stand untrammeled by the pique attack of its dissenters.

We cannot presume to know whether this judgment will be disturbed or not, but in either event the law of the case cannot be changed without the basic standards and principles which the United States Supreme Court itself has adhered to, also be changed.

So far as the petitioner's interest is concerned he is simply grieved with the result and not the law. There was no invasion of petitioner's rights under Ohio law nor the 14th amendment. In the trial court there was only a question of law to be resolved. This was not another *Dollree Mapp* case. All of the members of the Ohio Supreme Court were agreed that "under well established law, the search of defendant and seizure of the packets of clearinghouse slips, all without a warrant, were lawful if the search and seizure followed a valid arrest"; five of the seven members of the court agreed that it was a valid arrest.

The record shows that in this case the defense witness repeatedly stated that he arrested the petitioner for the commission of a felony. These statements were not controverted by any one. Yet in this Court and the Appellate Courts of Ohio the petitioner has asserted that the arrest was for a misdemeanor; though the highest court in this state has determined that the offense described under R. C. 2915.111 is a felony. *State vs. Beck*, 175 O. S. 73.

> "It has been held that where the violation of a criminal statute carries a penalty of a substantial fine and imprisonment for a period of one or more years and the person convicted under the statute is sentenced to the penitentiary, his offense is classed as a felony." (Citing cases.)

In Ohio misdemeanors are defined by statute as minor offenses, O. R. Code 1.06. There is no provision in this state that provides that you may be sentenced to the penitentiary for the commission of a misdemeanor no matter how many times you commit the same offense. However, a person may be sentenced to the penitentiary for a subsequent violation of R. C. 2915.111. Therefore it is of small consequence what particular offense the petitioner was ultimately charged with so long as it related to the crime the police officers believed he was committing.

> "There is a difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest and search." *Brinegar v. United States*, 338 U. S. 160-172-173.

Although the petitioner directs the court's attention to numerous United States Supreme Court decisions, the controlling facts of those cases are totally different from the facts in this case. In the instant case the police had to find the petitioner at a time of day in a particular locality doing the very thing they expected to find him doing and when they did find him under such circumstances the only appropriate arrest that could be made, had to be made at the moment of discovery. There would be no time for obtaining warrants.

The officers knew that they had probable cause to arrest the accused and "Beck" knew tha. the officers had probable cause to arrest him. He knew at the time he was apprehended he was committing a continuing offense

in the presence of the officers. In fact it can be gathered from the petitioner's minute preparations that he anticipated the arrest and had prepared for such a contingency. What he did not reckon with however, is that the police would cart him off to a police station where an appropriate and complete search could be made for the clearinghouse slips which they knew had to be on his person.

The only hitch in the minority opinion is that it claimed it was not a valid arrest because in their opinion the arresting officers had to have something more than "probable cause." In their opinion a bona fide belief based upon probable cause was not enough. The officers had to actually see and identify the contraband while in possession of the accused before they could intercept him.

> "If the officers were to see the clearinghouse slips in the hand of the suspect or enough of the slips protruding above a pocket of the suspects to identify it as a clearinghouse slip, the crime of possessing clearinghouse tickets would be committed in his presence."

It is however, inconceivable that the accused would be so foolhardy as to flaunt the evidence in the face of the police. Consequently, if the minority opinion is a correct one, then the officers of the law shall be required to stand idly by while such operations are carried on before their very eyes—but can do nothing because the contraband which they know is there is concealed from view and the operator of the automobile will not stand long enough for the officer to obtain a warrant to search and seize such contraband. As of now such a theory is unsupported by authority. The only support is the statement contained in the minority opinion in which the writer of the opinion states "In my opinion this misdemeanor was not committed in the presence of the officers."

How insincere was the belief of "Beck" that he was illegally arrested can easily be gathered from the questions asked the officer on direct examination (Pet. Brief 5 and 6). They were intended only to present a factual picture of the action which took place at the scene of the arrest and the subsequent search. Petitioner actually avoided asking the witness what was the information that "sparked" the investigation.

Certainly, the law is entitled to at least an equal chance in enforcement, as the criminal exercise in violating the law.

When the officers know their man! When they know his record! When they have information that he is back in the racket! When he is found under the same circumstances, doing the same thing that he had been doing on other occasions when he was arrested, shouldn't the police act with the same dispatch and urgency that the offender does in trying to get away with breaking the law?

Does the government have the right to refuse to reveal the identity of an informer or source of information?

So far as the decisions of this State are concerned the courts have consistently held that the government does not have to reveal such information.

The most recent case which has dealt with this subject is, *State v. Viola*, 51 Ohio Abs., 577, decided June 6, 1947,—the headnote reads as follows:

> "In a criminal trial, a police officer should not be compelled to divulge the identity of his informant whose information led to the apprehension of the accused, since to compel him to do so would tend to cause persons possessing valuable information concerning crimes committed to conceal it from proper authorities for fear of unwanted publicity."

Other cases which have been decided in which the privilege has been discussed is *State, Ex Rel. Kehker v. Wolf*, 26 Ohio Nisi Prius (N. S.), 521, and *Parker v. Reddy*, 14 O. C. C. (N. S.) 288. Both of these cases held that communications made to police officers of the violation of the law are privileged communications.

It is usually the case, in each instance when this subject is discussed that reference is directed to the United States Supreme Court case, *In Re Quarles and Butler, Petitioners*, 158 U. S. Reports, page 532. On page 535 of the opinion in that case the court said:

> "It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the posse comitatus in upholding the laws of his country. It is likewise his right and duty to communicate to the executive officers any information he has of the commission of an offense against those laws; and such information given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government."

The above mentioned United States Report has neither been reversed nor criticized in any later opinion of that Court so that it can be reasonably stated that as a general rule the government does have the right to refuse to reveal the identity of an informer or the source of information.

In recent Federal Court cases—in those instances where search and seizure has been made *without* a search warrant, the Courts have held where disclosure of informer identity or contents of communication *is relevant*

on issue of probable cause, the court may require disclosure and if government withholds information dismiss the action.

These rulings, however, are only applicable when the court orders the witness to reveal such information and he refuses. These cases have no application in those instances where the court does not order the witness to reveal such information.

In the instant case it is well to note that the trial judge did not order the witness to relate the name of the informer, stating that such information was irrelevant.

There is nothing in the record of this case to show the Petitioner was deprived of "due process," nor that failure to reveal the name of the informer was prejudicial to the rights of the Petitioner.

Respectfully submitted,

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